**The Hartz Mountain Corporation *and* District 65, U.A.W., AFL-CIO.** Case 22-CA-12119

4 August 1983

## DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JENKINS AND ZIMMERMAN

Upon a charge filed on 4 January 1983 by District 65, U.A.W., AFL-CIO, herein called the Union, and duly served on The Hartz Mountain Corporation, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 22, issued a complaint on 19 January 1983 against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on 22 November 1982, following a Board election in Cases 22-RC-7753, 22-RC-7754, and 22-RC-7803, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and that, commencing on or about 10 December 1982, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On 22 February 1983 Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On 28 February 1983 counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on 3 March 1983 the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to the Notice To Show Cause.

[1] Official notice is taken of the record in the representation proceeding, Cases 22-RC-7753, 22-RC-7754, and 22-RC-7803, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co.* v. *Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

### Ruling on the Motion for Summary Judgment

In its answer to the complaint and response to the Notice To Show Cause, Respondent denies that it has refused to bargain with the Union and that the Union continues to request bargaining; contests the validity of the Union's certification; and contends that the Regional Director erred in overruling its objections to the election. Specifically, Respondent argues that it did not refuse to bargain with the Union but merely informed the Union by letter dated 10 December 1982 that its bargaining demand would be taken under advisement pending a ruling from the United States District Court for the District of Columbia on Respondent's petition to invalidate the Union's certification. Respondent further asserts that it construed statements made by counsel for the General Counsel during the district court proceedings as assurances that the General Counsel would not issue an unfair labor practice complaint alleging a refusal to bargain until the district court rendered its decision. Respondent further argues that the Union has not made a continuing request for bargaining. Finally, Respondent contends that the Union's certification is invalid both because the Board erroneously failed to certify the results of the first election in the underlying representation proceeding and because it erroneously failed to set aside the results of the second election based on objections timely filed by Respondent.

With respect to the issue of whether the Union has made and Respondent has rejected a valid bargaining demand, we find no merit in Respondent's reliance on the pendency of its suit before the district court to justify a delay in the commencement of bargaining. Respondent has admitted in its answer to the complaint that the Union requested bargaining by letter dated 3 December 1982. In addition, Respondent's brief in opposition to the Motion for Summary Judgment acknowledges that "it is of course hornbook law that the pendency of collateral litigation is normally not a defense to a charge of refusal to bargain." Contrary to Respondent, we do not construe any statements by counsel for the General Counsel as constituting a binding commitment to delay processing any refusal to bargain charge pending a decision on the merits of Respondent's district court action. In any event, we note that United States District Court

Judge Barrington Parker denied Respondent's motion for relief against the Board and dismissed Respondent's complaint in a memorandum opinion issued on 31 January 1983.[2] Respondent has nevertheless persisted in refusing to bargain with the Union. Although the Union was under no obligation to renew or reiterate its valid 3 December 1982 bargaining demand, it did so by filing the unfair labor practice charge at issue here on 4 January 1983.[3]

With respect to all other issues raised by Respondent, the General Counsel contends that Respondent improperly seeks to litigate issues which were raised and decided in the representation case. We agree with the General Counsel. A review of the record, including that in the representation case, reveals that an election in Cases 22-RC-7753, 22-RC-7754, and 22-RC-7803, conducted pursuant to a Stipulation for Certification Upon Consent Election on 20 April 1979, resulted in a vote of 178 for Teamsters Local 806, 156 for District 65, U.A.W., AFL-CIO, 1 against the participating labor organizations, and 2 challenged ballots. Thereafter, District 65 filed timely objections to the election. The Regional Director issued his Report on Objections, Order Consolidating Cases and Notice of Hearing on the objections and related unfair labor practices. Following an Administrative Law Judge's Decision on the merits in the consolidated cases, Respondent filed exceptions to the Decision. On 18 February 1982 the Board issued its Decision, Order, and Direction of Election[4] in which the Board, *inter alia*, affirmed the Administrative Law Judge's Decision and recommendations to approve Local 806's disclaimer of interest; granted Local 806's request to withdraw its representation petitions and intervention in District 65's petition; approved District 65's withdrawal of the unfair labor practice charges; dismissed the complaint; declared the first election a nullity; and ordered a second election with District 65 as the sole labor organization appearing on the ballot.

The second election was conducted on 19 March 1982, resulting in a vote of 134 for District 65, 101 against, and 23 challenged ballots. Thereafter, Respondent filed timely objections to the election alleging that the Union, its agents, and several prounion employees created an atmosphere of fear and reprisal the night before the election by provoking a violent brawl and assaulting several employees; that union agents precluded a fair election by threatening employees with reprisals, including physical harm; and that the Union made a material misrepresentation at a time when it was impossible for Respondent to effectively rebut it. On 26 March 1982 the Regional Director issued his Supplemental Decision, Order Directing Hearing and Notice of Hearing. Following the hearing, the Hearing Officer's Report and Recommendations on Objections issued on 28 June 1982, recommending that Respondent's objections be overruled in their entirety and that a certification of representative issue. Respondent filed timely exceptions to the Hearing Officer's report, after which the Board adopted the Hearing Officer's report and issued a Decision and Certification of Representative on 22 November 1982.[5]

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[6]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

## FINDINGS OF FACT

### I. THE BUSINESS OF RESPONDENT

Respondent, a New Jersey corporation, has been engaged in the manufacture, sale, and distribution of pet food and related products at 305 Broadway, Jersey City, New Jersey. In the course and conduct of its business operations, Respondent annually sells and ships from its Jersey City facility goods and products valued in excess of $50,000 directly to points located outside the State of New Jersey.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and

[2] *Hartz Mountain Corp. v. John R. Van de Water*, Civil Action No. 82-3412.

[3] E.g., *Torrington Construction Co.*, 235 NLRB 1540, 1545, fn. 9 (1978).

[4] *Hartz Mountain Corp.*, 260 NLRB 323.

[5] Chairman Dotson, who was not on the Board when the cases discussed above were decided, does not hereby indicate whether he agrees with the holdings of those cases.

[6] See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

that it will effectuate the policies of the Act to assert jurisdiction herein.

## II. THE LABOR ORGANIZATION INVOLVED

District 65, U.A.W., AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

## III. THE UNFAIR LABOR PRACTICES

### A. *The Representation Proceeding*

#### 1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All production and maintenance employees, including warehouse employees and production and warehouse clerical employees, employed by the Employer at its Jersey City, New Jersey, facility, excluding all office clerical employees, professional employees, guards and all supervisors as defined in the Act.

#### 2. The certification

On 19 March 1982 a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 22, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on 22 November 1982, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

### B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about 3 December 1982, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about 10 December 1982, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since 10 December 1982, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

## IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

## V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to ensure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).[7]

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

## CONCLUSIONS OF LAW

1. The Hartz Mountain Corporation is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. District 65, U.A.W., AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees, including warehouse employees and production and warehouse clerical employees, employed by the Employer at its Jersey City, New Jersey, facili-

[7] We hereby deny the requests by the General Counsel and the Union for a remedial order directing Respondent to reimburse them for litigation and related expenses. We find such an extraordinary remedy inappropriate in this test-of-certification proceeding.

ty, excluding all office clerical employees, professional employees, guards and all supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since 22 November 1982 the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about 10 December 1982, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

## ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, The Hartz Mountain Corporation, Jersey City, New Jersey, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with District 65, U.A.W., AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All production and maintenance employees, including warehouse employees and production and warehouse clerical employees, employed by the Employer at its Jersey City, New Jersey, facility, excluding all office clerical employees, professional employees, guards and all supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its 305 Broadway, Jersey City, New Jersey facility copies of the attached notice marked "Appendix."[8] Copies of said notice, on forms provided by the Regional Director for Region 22, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 22, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

[8] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted By Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## APPENDIX

### NOTICE TO EMPLOYEES
### POSTED BY ORDER OF THE
### NATIONAL LABOR RELATIONS BOARD
### An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with District 65, U.A.W., AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding

is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All production and maintenance employees, including warehouse employees and production and warehouse clerical employees, employed by the Employer at its Jersey City, New Jersey, facility, excluding all office clerical employees, professional employees, guards and all supervisors as defined in the Act.

THE HARTZ MOUNTAIN CORPORATION